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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

GUSTAVO SARABIA VARGAS,

Defendant and Appellant.

E047426

(Super.Ct.No. SWF022463)

OPINION

APPEAL from the Superior Court of Riverside County. Carl E. Davis, Judge.
Affirmed.

David L. Polsky, under appointment by the Court of Appeal, for Defendant and
Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia, and
Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

A jury found defendant and appellant Gustavo Vargas guilty of second degree robbery under Penal Code section 211, and evading a police officer by reckless driving under Vehicle Code section 2800.2. Thereafter, the trial court found true the allegations that defendant had served a prior prison term within the meaning of Penal Code section 667.5, subdivision (b); had suffered one serious prior felony conviction within the meaning of Penal Code section 667, subdivision (a); and had suffered six prior strike convictions within the meaning of Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

On December 22, 2008, the trial court denied defendant's motion to dismiss five of six strike priors under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). The court sentenced defendant to 50 years to life plus six years in state prison.

On appeal, defendant contends that the trial court abused its discretion in denying his *Romero* motion. For the reasons set forth below, we shall affirm the judgment.

II

FACTUAL AND PROCEDURAL HISTORY

In August 2007, Ryan Abellar was employed as a pharmacy technician at Walgreens drugstore at the intersection of Murrieta and Newport Roads in Riverside County. At approximately 8:00 p.m. on August 6, 2007, Abellar was assisting a customer when defendant approached the pharmacy counter and "kind of pushed [the

customer] to the side.” Defendant was wearing a baseball cap and the lower portion of his face was concealed by a white bandana. He held a gun in one hand and was using his other hand to cover the firearm with a white piece of paper.

Defendant demanded money. Abellar did not know whether defendant’s gun was real, but he “wasn’t going to find out the hard way.” Abellar emptied all three cash registers, placed the money in a plastic shopping bag, and handed the bag to defendant.

Defendant then asked for narcotics. Abellar asked what kind. Defendant responded by telling Abellar not to make defendant angry or he would come over the counter. Abellar retrieved four unopened bottles of Vicodin from a nearby shelf; he handed the drugs, worth about \$800 or \$900, to defendant in another plastic shopping bag. Abellar then followed defendant’s directive to turn around and get on his knees.

Assistant store manager Erik Albrecht was stocking merchandise when defendant, still in a baseball cap and bandana, briskly walked past him and headed toward the front doors of the store. Moments later, Albrecht learned of the robbery; he ran to the front door. Albrecht saw defendant getting into a green Nissan sports utility vehicle that was parked in the Walgreens lot. Defendant drove out of the parking lot onto Newport Road and headed in the direction of Interstate 215. Walgreens employee Tony Guevara got into his own car and began to pursue defendant.

Sergeant Ryan Hoxmeier of the Riverside County Sheriff’s Department was en route to Walgreens in a marked patrol car when he heard over the radio that defendant had left the location in a vehicle. Defendant then drove past the patrol car, heading in the

opposite direction on Newport Road. Guevara, still in pursuit, flagged down Sergeant Hoxmeier and directed his attention to the SUV. Hoxmeier made a U-turn and began to pursue defendant.

After making a left-hand turn onto Killington Drive, defendant abruptly pulled over. He opened the driver's door and partially stepped out of the SUV. However, when the sergeant followed suit, defendant got back into the SUV and drove off at a high rate of speed.

Ignoring the lights and sirens of the pursuing patrol car again behind him, defendant drove through and circled around the nearby residential neighborhood while running stop signs and exceeding speed limits by up to 45 miles per hour. Homeowners and children gathered outside, some stood at the edge of the street. The sergeant feared for everyone's safety.

As the pursuit continued, defendant reached speeds in excess of 100 miles per hour and continued to drive through stop signs. At one point, defendant ran a red light and then drove across all lanes of traffic, hopped a curb, and ran over a bus stop sign.

The vehicle pursuit transformed into a foot chase after defendant drove his SUV into a cul-de-sac and then got out of the vehicle. Sergeant Hoxmeier caught up with defendant as he crouched by a large pine tree. At gunpoint, the sergeant repeatedly ordered defendant to display his hands. Defendant ignored each directive. Instead, defendant took items from his waistband and stuffed them, and then the shirt off his back, into a tree.

After defendant was taken into custody, the officers found cash, gloves, and Vicodin pills wrapped in tissue paper on defendant. The unopened Vicodin bottles and part of a toy gun were recovered from defendant's SUV. A bag containing \$209 was found in the street near the SUV; a baseball cap, a white handkerchief, and \$216 in cash were discovered in or around the pine tree. A search of defendant's residence revealed various loose pills and prescription pill bottles.

III

ANALYSIS

Defendant's sole contention on appeal is that the trial court abused its discretion in denying his *Romero* motion to dismiss five of his six strike priors.

A trial court's decision whether or not to dismiss or strike a prior serious and/or violent felony conviction allegation under Penal Code section 1385 is reviewed for abuse of discretion. (*People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*)). "In reviewing for abuse of discretion, we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.'" [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.]

Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.” (*Id.* at pp. 376-377, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978, quoting *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831, and *People v. Preyer* (1985) 164 Cal.App.3d 568, 573; see also *People v. Myers* (1999) 69 Cal.App.4th 305, 309 (*Myers*).)

The California Supreme Court explained, “In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not ‘aware of its discretion’ to dismiss [citation], or where the court considered impermissible factors in declining to dismiss [citation].” (*Carmony, supra*, 33 Cal.4th at p. 378, citing *People v. Langevin* (1984) 155 Cal.App.3d 520, 524, and *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434.) Discretion is also abused when the trial court’s decision to strike or not to strike a prior is not in conformity with the “spirit” of the law. (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *Myers, supra*, 69 Cal.App.4th at p. 310.)

But “[i]t is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions. Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling, even if we might have ruled differently in the first instance. [Citation.]” (*Myers, supra*, 69

Cal.App.4th at p. 310.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*Carmony*, *supra*, 33 Cal.4th at p. 378, quoting *People v. Strong* (2001) 87 Cal.App.4th 328, 338.)

The touchstone of the analysis must be “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams*, *supra*, 17 Cal.4th at p. 161; see also *People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) A decision to dismiss a strike allegation based on its remoteness in time is an abuse of discretion where the defendant has not led a life free of crime since the time of his conviction. (*People v. Humphrey* (1997) 58 Cal.App.4th 809, 813.)

Defendant contends that the court should have granted his motion to strike all but one of his prior convictions because (1) the priors were committed 23 years earlier and in a single period of aberrant behavior; (2) his release from prison in 1992 was followed by an 11-year felony-free and productive life; (3) the misdemeanor convictions he suffered during this 11-year period, as well as his subsequent commission of felony vandalism in

2002 and the current felonies in 2007, were attributable to his drug addiction; (4) the Walgreens robbery did not involve the use of a real gun or physical harm; and (5) the imposition of a determinate term with a single strike prior would result in a lengthy prison sentence. With regard to his drug addition, defendant indicates that he had controlled his addiction until April 2007 “when, through no fault of his own, he was assaulted and sustained a head injury and broken eye socket. To treat his injuries, his doctor prescribed him Vicodin, which triggered his drug addiction again. Thus, the record showed not that his current offenses were the result of his failure to control his behavior but the result of an involuntary relapse into addiction, something beyond his control.”

Notwithstanding defendant’s characterization of the record, we cannot conclude the trial court abused its discretion in declining to strike defendant’s prior strike convictions. The relevant considerations supported the trial court’s ruling, and there is nothing in the record to show that the court declined to exercise its discretion on improper reasons or that it failed to consider and balance the relevant factors, including defendant’s personal and criminal background. In fact, the record clearly shows the court was aware of its discretion, aware of the applicable factors a court must consider in dismissing a prior strike, and appropriately applied the factors as outlined in *Williams*.

This case is far from extraordinary. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. In the current offense, although defendant did not use an actual gun, he scared his victim with what appeared to

be a real gun and then led Sergeant Hoxmeier through an extremely dangerous high-speed chase. Moreover, defendant has a serious prior record of criminal behavior. As a juvenile, defendant suffered at least 15 arrests and two commitments to the Department of Juvenile Justice (DJJ) for crimes including robbery, assault with intent to murder, assault with a deadly weapon, carrying a loaded gun in public, and grand theft. Thereafter, as an adult, defendant continued to commit crimes.

In 1981, three years after he was last paroled from DJJ, defendant suffered a misdemeanor conviction for throwing an injurious substance on a highway. In 1982, defendant was arrested for assault with a deadly weapon. While the case was pending, defendant was arrested for selling narcotics. These offenses resulted in the imposition of a four-year term in state prison. In May of 1984, defendant escaped from prison and proceeded to commit a series of armed robberies. In October of that same year, he was convicted of the escape charge, and also convicted of four counts of robbery with a firearm and three counts of assault with a firearm (six of these being the strike priors alleged in this case). Defendant received a 12-year prison sentence. In December of 1990, defendant was paroled. Six months later, he was returned to prison for violating parole. In 1998, defendant was convicted of driving under the influence. In 1999, defendant suffered a second DUI conviction and, in a separate case, pled guilty to contributing to the delinquency of a minor. In 2002, defendant was convicted of felony vandalism, for which he served a 10-month term in prison. Finally, months before the current crime, defendant was arrested for assault with a deadly weapon.

The court here could not overlook defendant's serious criminal history. At the hearing on defendant's *Romero* motion, the court stated:

"I must say this is a part of my job that I do not like. But I have to tell you – and I'm not going to respond to all of the comments that have been put forth here. The offense, I regard as deadly serious, if nothing more than scaring people half to death. And it was cops and robbers from there. This high-speed chase is extremely dangerous. So when I look at the offenses I regard them, as I say, as deadly serious. And there's no discount insofar as those offenses are concerned.

"Now, [defendant's] criminal history speaks for itself. It's serious and it's long. He's done good things in his life and it's been said here. I'm not judging him in the moral sense as being evil. I'm put here to decide things, not to judge people, and I don't do so. The good people who speak on your behalf and the people who've given you a lot of recognition and a lot of credit for things, every time I am confronted with that situation what always occurs to me is that you let a lot of good people down. And that's what's happened here. You let a lot of good people down.

"And from your history, I can tell you why you get in these problems is you don't think. And that is a common problem among career criminals. They are impulsive and they don't think. They just – when the urge is there, they do it. No one in his right mind could call this an unusual case for sentencing purposes. I have to judge the protection of society along with you. And I am just as convinced that . . . there would just be another

episode, an unthinking episode crime. So as much as I dislike this part of my job, I'll proceed with the sentencing."

We agree with the trial court's assessment of defendant. Periods of productivity notwithstanding, defendant's conduct as a whole was a strong indication of unwillingness or inability to comply with the law. He has shown his continual disregard for the law as evidenced by his continual parole and probation violations and criminal convictions. It is clear from the record that prior rehabilitative efforts have been unsuccessful for defendant. Indeed, defendant's prospects for the future look no better than the past, in light of defendant's record of prior offense and reoffense. All of these factors were relevant to the trial court's decision under *Romero*; there is no indication from the record here that the court failed to consider the relevant factors or that it failed to properly balance the relevant factors or that it abused its discretion in determining that, as a flagrant recidivist, defendant was not outside the spirit of the three strikes law.

(*Williams, supra*, 17 Cal.4th at p. 161.)

Indeed, defendant appears to be "an exemplar of the 'revolving door' career criminal to whom the Three Strikes law is addressed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 717.) Thus, given defendant's continuous criminal history, his numerous parole and probation violations, and the seriousness of the past and present offenses, we cannot say that the trial court abused its discretion when it declined to dismiss defendant's prior strike convictions. The trial court's decision not to strike defendant's priors was neither irrational nor arbitrary.

In short, defendant was within the spirit of the three strikes law (see *Williams*, *supra*, 17 Cal.4th at p. 161); the trial court did not rule in an “arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice” (see *People v. Jordan* (1986) 42 Cal.3d 308, 316); and we find no abuse of discretion (see *Romero*, *supra*, 13 Cal.4th at p. 504).

IV

DISPOSITION

The judgment is affirmed.

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/s/ McKinster
J.

We concur:

/s/ Ramirez
P.J.
/s/ King
J.